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IN THE

Supreme Court of the United States

October Term, 1969
No. 1475

UNITED STATES OF AMERICA,

Appellant,

vs.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, CLAIMANT,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees move that the judgment of the district court be affirmed.

Statement.

On October 24, 1969, customs agents in Los Angeles, California, seized from the appellee Luros, a citizen of the United States, a book, album, magazine and thirty-seven photographs (Jurisdictional Statement, Appendix C, pp. 22-23). Appellee Luros was returning to this country following a visit to Europe and the material was seized upon his return. On October 31, 1969, the District Director of the Bureau of Customs advised that the Bureau had referred the matter to the United

States Attorney for the Central District of California for forfeiture action (*Id.* pp. 22-23). On November 4, 1969, the attorney for appellees wrote to the District Director of the Bureau of Customs requesting the forthwith delivery of the seized material. On November 5, 1969, the United States Attorney, by his assistant, released to attorney for appellees all the material which had been seized by customs except the thirty-seven photographs (*Id.* p. 23). On November 6, 1969, the Government filed its complaint seeking judicial approval to enforce the forfeiture of the photographs. On November 14, 1969, appellees filed their answer and counterclaim (*Id.* p. 23). Pursuant to the prayer of the appellees contained in their counterclaim, a three-judge district court (Ferguson, Barnes, Curtis, JJ.) was convened pursuant to 28 U.S.C. §§ 2282 and 2284 to determine whether the Government should be enjoined from enforcing 19 U.S.C. § 1305 (*Id.* p. 15). On January 27, 1970, the three-judge court rendered an opinion (*Id.* pp. 15-19), holding that 19 U.S.C. § 1305, in the light of the rulings by this Court in *Stanley v. Georgia,* 394 U.S. 557 and *Freedman v. Maryland,* 380 U.S. 51, on its face and as construed and applied violates the rights guaranteed to appellees under the free speech and press and due process provisions of the First and Fifth Amendments (*Id.* p. 19). Accordingly, and in accordance with the findings of the district court, a judgment was entered (*Id.* pp. 20-21), restraining and enjoining the Government from enforcing the provisions of 19 U.S.C. § 1305 against appellees; directing the return of the photographs; and declaring that the statute on its face and as construed and applied violates the constitutional rights of appellees. The memorandum opinion of the district court is reported at 309 F. Supp. 36.

ARGUMENT.

The district court correctly concluded that 19 U.S.C. § 1305 is unconstitutional on its face because it fails to meet and conflicts with the standards and criteria enunciated by the Court in *Stanley v. Georgia*, 394 U.S. 557, and *Freedman v. Maryland*, 380 U.S. 51. The points raised by appellant are not sufficiently substantial to warrant plenary consideration by this Court. Accordingly, it is submitted it would be appropriate for the Court to affirm the judgment below summarily.

1. In mounting its attack upon the judgment of the district court, the Government commences with the assertion that the importation of an allegedly obscene item "for private, non-commercial use by the importer himself" (Jurisdictional Statement, p. 8) is unlawful and without constitutional protection. It is stated that the decision of the Court in *Stanley* does not control "even as to private, non-commercial importations" (*Id.* p. 9). These conclusions are premised upon the argument that in *Stanley* "there is no right to receive obscene matter, as such" (*Id.* p. 8).

Stanley does not stand alone. The decision represents the latest stage of the judicial process marking out the constitutional safeguards essential to protect freedom of expression in matters pertaining to problems of sex. Thus, the decision in *Roth v. United States*, 354 U.S. 476, while declining to give First Amendment protection to "obscenity", nevertheless admonished that sex and obscenity were not synonymous; that the standards for judging obscenity must safeguard the protection of the freedoms of speech and press; that a test which permitted the suppression of material if any portion of the material was deemed likely

to corrupt highly susceptible persons was unconstitutionally restrictive.

The rulings which followed *Roth* plainly demonstrated the difficulty of reconciling the standards and criteria for judging obscenity enunciated in *Roth* with the limitations on governmental power contained in the First and Fourteenth Amendments to the Constitution. A definition of "obscenity" as a workable principle has appeared almost impossible to promulgate, and members of this Court, as well as state and federal courts, have acknowledged the need for a reexamination and refinement of the standards for judging obscenity.

In *Jacobellis v. Ohio,* 378 U.S. 184, the Court was compelled to admonish that any attempt to "weigh" the social value of alleged obscene material against prurient appeal would undermine freedom of expression. In *Memoirs v. Massachusetts,* 383 U.S. 413, the Court emphasized that each of the three criteria for judging obscenity were to be applied independently, and that material could not be proscribed unless "found to be utterly without redeeming social value". 383 U.S. at 419.

Finally, the *per curiam* opinion in *Redrup v. New York,* 386 U.S. 767, acknowledged the differing constitutional views held by members of the Court in the obscenity area. It was stated that whichever constitutional view was brought to bear upon the cases before the Court in *Redrup,* the judgments could not stand; that "the distribution of the publications" in each of the cases was protected by the First and Fourteenth Amendments from governmental suppression. 386 U.S. at 770. Moreover, the *per curiam* opinion pointedly

observed that "in none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles"; "in none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it"; "and in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States". 386 U.S. at 769.

2. Contrary to the Government's assertion, the right to receive information and ideas, regardless of their social value, was the fundamental right which the Court sought to protect in *Stanley*, although that basic right took on "an added dimension" in the context of the case (possession of obscene materials in the privacy of a home). The assertion of a governmental interest in dealing with the problem of obscenity could not in every context, the Court stated, be insulated from all constitutional protections. "Neither *Roth* nor any other decision of this Court reaches that far". 394 U.S. at 563. "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] * * * necessarily protects the right to receive * * *.' * * * This right to receive information and ideas, regardless of their social worth, * * * is fundamental to our free society." 394 U.S. at 564.

In *Stanley* the Court could find no countervailing State interest justifying restriction of the aforesaid fundamental rights. The mere categorization of the material as "obscene" was insufficient; the claim that the State had the right to control the moral content of a person's thoughts was inconsistent with the philosophy

of the First Amendment; the assertion by the State that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence was rejected because "among free men, the deterents ordinarily to be applied to prevent crime are education and punishment for violations of the law." The only evils which the State might have a right to prevent, the distribution of obscene material to minors or the distribution in such a manner as to invade the privacy or sensibilities of the general public, were not present in the context of private consumption of ideas and information. 394 U.S. at 565-567.

3. The argument of the Government that a citizen may not validly import or receive that which he has the freedom to possess undermines the rights which *Stanley* sought to protect. Freedom of speech and press "embraces the right to distribute literature, . . . and necessarily protects the right to receive it . . . Freedom to distribute information to every citizen wherever he desires to receive it is . . . clearly vital to the preservation of a free society." *Martin v. Struthers,* 319 U.S. 141, 143-147. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . ." *Griswold v. Connecticut,* 381 U.S. 479, 482. The freedom of an adult to the private possession of allegedly obscene material would be meaningless if Government were to deny to the citizen all access to such material. Without the right of citizens to import such materials, or to purchase and receive such materials by the ordinary means of circulation, the right of private possession would become meaningless. See *Lamont v. Postmaster General,* 381 U.S. 301.

Other arguments advanced by the Government appear equally tenuous. The issue here is not whether Congress, in the light of developing constitutional standards, may enact a statute narrow in scope affecting the importation of obscene materials (Jurisdictional Statement, p. 7); the question is whether the present statute, 19 U.S.C. § 1305, is unconstitutionally overbroad in the light of the decision in *Stanley*. Nor do we deal here with the "transportation of women in interstate or foreign commerce for immoral purposes" (*Id.*, p. 9); the issue in this case is whether the constitutional guarantees of freedom of speech and the press stand in the way of imposing restrictions upon a citizens's right to the private consumption of ideas and information. See *Smith v. California*, 361 U.S. 147, 152-153.

Finally, even if it be assumed that books and papers may be inspected at the borders of the country "if for nothing else than to see what may be concealed between their leaves" (Id., p. 9) it does not follow that books and papers may be confiscated and denied to citizens for private use if nothing is found concealed between the pages.[1]

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[1]At the time of the filing of the Jurisdictional Statement, the Government noted that the validity of the customs statute under *Stanley* was also pending before a three-judge court in the Southern District of New York. (p. 7, fn. 2). A decision by the court was rendered on June 8, 1970. *United States v. Various Articles of Obscene Merchandise*, 68 Civ. 2972. The court held that as applied to importation of obscene materials by a citizen for his own private use, the customs statute was unconstitutional. It was held that a statute which by its terms prohibits importation by an individual of obscene material for his own private use and enjoyment in his own home offends the First Amendment and must be held unconstitutional. Since the claimant was himself within the privileged area, and since the statute was narrowed by the court to forbid its application to him, the district court deemed it unnecessary to invalidate the entire statute. The court

(This footnote is continued on the next page)

4. The Government's argument that standing should be denied to appellees because of their admission that they imported the pictures in question for commercial purposes is without merit. In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground of overbreadth with no requirement that such person attacking the statute demonstrate that his own specific conduct is privileged. With respect to overbroad statutes in the First Amendment area, it is not merely the possibility of arbitrary suppression by officials in particular cases, but the deterring and chilling effect inherent in the very existence of the statute that constitutes the danger to freedom of expression. *Thornhill v. Alabama,* 310 U.S. 88, 97-98; *Freedman v. Maryland,* 380 U.S. 51, 56; *Zwickler v. Koota,* 389 U.S. 241, 249-250; *NAACP v. Button,* 371 U.S. 415, 432-433; *Aptheker v. Secretary of State,* 378 U.S. 500; *Dombrowski v. Pfister,* 380 U.S. 479, 487.

The government argues that "where vagueness is absent, there is no spectre of a possible 'chilling effect' through uncertainty to justify an expansive attitude toward standing to raise the constitutional claims of others." (Jurisdictional Statement, p. 10). This argument suffers from a number of defects. In the first

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did suggest that obscene material, in certain situations, can now apparently invoke constitutional protection under *Stanley,* and for that reason 19 U.S.C. § 1305 may be unconstitutional even as it applies to importation for commercial distribution, in the absence of a government showing that one of the legitimate state interests summarized in *Redrup* will be infringed by commercial distribution subsequent to importation.

place, the threat of sanctions under an overbroad statute may deter the exercise of First Amendment freedoms as potently as an actual application of sanctions precisely because of the clarity of its language. See *Aptheker v. Secretary of State, supra,* at 515-517. In the second place, it ignores reality to assert that "vagueness is absent" in the obscenity area. Virtually every member of the Court has stressed the vagueness and uncertainty of the obscenity definition. The chilling effect of an overbroad statute under such circumstances is not only "possible"; it is certain.

Moreover, the government cannot seriously claim that the importation of obscene material for commercial purposes is the sort of "hard-core" conduct that would obviously be prohibited "under any construction" of the statute. (Jurisdictional Statement, p. 11). As *Redrup* and *Stanley* indicate, the state's interest in prohibiting the commercial distribution of obscene materials may be limited to minors and those persons upon whom the material is obtrusively forced. Mere commercial distribution to willing adults is plainly not "hard-core." We are not dealing here with "solicitors for gadgets and brushes"; we are dealing here with the unlimited power of the adult citizen to judge for himself what ideas, information and entertainment he will receive. See *Rowan v. United States Post Office Department,* ..... U.S. ....., 90 S.C. 1484.

5. The district court held additionally that 19 U.S.C. § 1305 failed to provide the procedural safeguards re-

quired by the First and Fifth Amendments. Pointing to the decision of the court in *Freedman*, the district court held that any restraint prior to judicial determination can be imposed only briefly, and that the censor in a specified brief period must seek judicial determination. The safeguards, the court stated, must be contained in the statute or in judicial rule. The court found that § 1305 is a system of censorship by customs agents, barren of such safeguards. (Jurisdictional Statement, Appendix A, pp. 17-18).

The Government argues that the statute meets procedural requirements even though the law does "not fix exact time limits" (*Id.*, p. 12), and despite the fact that from the date of the seizure on January 9, 1970, to the date of the court hearing, 76 days had passed. The district court stated below: "All concede that under present statutory procedures it could not have been accomplished any sooner." (*Id.*, p. 18). Nor does the Government deny that § 1305 does not prohibit customs agents from long delaying judicial determination. The discretion thus vested in the customs agents, without time limits fixed by the statute or by judicial rule, violates the First Amendment. *Freedman v. Maryland*, 380 U.S. 51, 56; *Teitel Film Corp. v. Cusack*, 390 U.S. 139; *Bantam Books v. Sullivan*, 372 U.S. 58. See Monaghan, *First Amendment "Due Process"*, 83 Harv. L.Rev. 518, 520-523 (1970).

6. The district court found it unnecessary to reach other issues raised by appellees in support of their

claims. (Jurisdictional Statement, Appendix A, pp. 16, 18). Without rejecting the argument, the court passed over appellees' contention that 19 U.S.C. § 1305 is unconstitutional because the statute purports to forbid the importation of obscene material even in the absence of any showing that the material is intended for distribution to minors or for distribution in a manner which intrudes upon the sensitivities or privacy of the general public. Appellees contend that the statute is thus constitutionally overbroad under the First Amendment and *Stanley*.[2]

Additionally appellees also urge the invalidity of the statute because the law purports to vest in customs officials discretion to seize books and other media of expression without an adversary hearing, in violation of the First and Fifth Amendments to the United States Constitution. *Marcus v. Search Warrants of Property*, 367 U.S. 717; *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Lamont v. Postmaster General*, 381 U.S. 301.

Finally, appellees contend that the statute is unconstitutionally vague, failing to provide the precision necessary to safeguard the exercise of freedoms of speech and press. See, Justice Black in *Ginzburg v. United States*, 383 U.S. 463, 478-481; Justice Douglas in *Ginzburg v. United States*, 383 U.S. at 483; Justice Harlan in *Memoirs v. Massachusetts*, 383 U.S. 413, 455-

[2]This issue is discussed in the Brief of Mel S. Friedman, Esq. and Stanley Fleishman, Esq. as Amici Curiae in *Batchelor, et al. v. Stein*, October Term, 1969, No. 565.

456; Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197; Chief Justice Warren in *Jacobellis v. Ohio*, 378 U.S. at 200-201; *Per curiam* in *Redrup v. New York*, 386 U.S. 767, 770-771.

Conclusion.

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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